

**LFC Requester:****Anne Hanika-Ortiz**

**AGENCY BILL ANALYSIS  
2016 REGULAR SESSION**

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**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**      X   **Amendment**          

**Correction**           **Substitute**          

**Date** 29 January 2016

**Bill No:** HB 278

**Sponsor:** Zachary J. Cook

**Agency Code:** 305

**Short**    Public Pension Forfeiture

**Person Writing**    Kenneth H. Stalter

**Title:**    Act

**Phone:** 505 222 9056 **Email** kstalter@nmag.gov

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Potentially Duplicates/Conflicts: HB 96, HB 260

Potentially Relates to: HB 80, HB 127, HB 155, HB 234, HJM 2, HJR 5, SB 41, SB 124, SJM 3

Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

**Synopsis:**

HB 278 creates a new short-title act, the Public Pension Forfeiture Act. Under this Act, a public official or employee who is convicted of a public corruption or campaign offense loses any service credit he or she has earned under the Public Employees Retirement Act, the Judicial Retirement Act, the Magistrate Retirement Act, or the Educational Retirement Act. The convicted employee or official is entitled to return of his or her accumulated member contributions.

For the purposes of the Act, a "campaign offense" is defined as a felony under the campaign practices act of Chapter 1, Article 19 NMSA 1978. A "public corruption" offense includes any felony either (1) defined in the government conduct act; (2) defined in Chapter 30, Article 41, NMSA 1978, regarding bribes and kickbacks; (3) is a crime that by existing definition, requires a finding that the defendant is a "public employee" or "public officer" under the criminal code; (4) where the state or a political subdivision of the state is a victim; or (5) where the finder of fact makes a specific finding beyond a reasonable doubt that but for the defendant's position of public employment, the defendant could not have committed the crime. Together, the definitions ensure that the Act applies only to felony convictions.

Upon convicting a covered defendant, the district court must order the appropriate retirement board to cease any benefit payments and return accumulated member contributions. This order, however, must account for any orders of child support or community property interests.

The order of forfeiture must also be stayed pending disposition of a direct appeal or any cases regarding dissolution of marriage or child support. The order of forfeiture is not to be stayed, however, if the defendant files a petition for writ of habeas corpus or other post-conviction relief.

The Act provides that if a member who loses service credit under the Act is subsequently pardoned, the loss of service credit shall be treated as if the member had voluntarily withdrawn his or her member contributions. This implies that in that circumstance, the member could repurchase service credit under the terms established by the applicable retirement act.

The Act has an effective date of July 1, 2016, and applies only to crimes committed after that date.

## **FISCAL IMPLICATIONS**

### **SIGNIFICANT ISSUES**

Twenty-six other states have some form of public pension forfeiture provision. HB 278 generally follows the structure and function of the provisions in other states. HB 278 embraces the following features from successful laws in other states:

- It applies only to crimes committed after its effective date, meaning it cannot be deemed an unconstitutional *ex post facto* law.
- It requires the return of accumulated member contributions, which suggests it satisfies substantive due process and will not run afoul of the constitutional prohibition on excessive fines.
- It is narrowly tailored such that it applies only to crimes with a nexus to public employment.
- It applies only after a finding of guilt in a criminal proceeding yet is also an automatic consequence of conviction, suggesting that the Act satisfies both procedural due process and the prohibition on double jeopardy.

Pension forfeiture statutes with these features in other states have been upheld as constitutional.

The New Mexico Constitution does create a protected property right in vested pension benefits. N.M. Const. art. XX, § 22. This protection, however, does not mean that vested members must retain benefits for life, no matter what crimes they commit. It only means that they must be afforded sufficient due process. This Act meets that standard because it requires loss of service credit only after conviction in a criminal proceeding, including the full range of rights, protections, and procedures attendant to any criminal case.

In this sense, the Act provides greater protections than forfeiture provisions that already exist in New Mexico statute. *Cf.* NMSA 1978, § 10-12B-17(B) (1992); NMSA 1978, § 10-12C-16(B) (2001).

Therefore, it appears that the Act would pass constitutional muster if challenged in court.

## **PERFORMANCE IMPLICATIONS**

### **ADMINISTRATIVE IMPLICATIONS**

The administrative implications of the Act appear to be minimal. Loss of service credit flows automatically from the fact of conviction, without need for additional proceedings. At most, in some cases, the prosecution may need to submit an additional jury instruction and verdict form so that the jury may make a special finding that the offense was a result of public employment.

The Act may result in fewer prosecutions if it serves its intended purpose of deterring public employees from committing public corruption and campaign offenses.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 278 conflicts with HB 96 and HB 260, both of which include public pension forfeiture provisions. HB 278 and HB 96 are structured similarly, but differ in their scope of

coverage. HB 260 follows a different structure. It provides for a pension forfeiture through bifurcated criminal and civil proceedings, such that a civil proceeding for forfeiture would follow the criminal case.

HB 278 is potentially related to the following bills: HB 80 (state ethics commission), HB 127 (school employee background checks), HB 155 (public corruption crimes & penalties), HB 234 (pension changes), HJM 2 (public employee benefit moratorium), HJR 5 (independent state ethics commission), SB 41 (state inspector general), SB 124 (state ethics commission), SJM 3 (public employee benefit moratorium).

## **TECHNICAL ISSUES**

## **OTHER SUBSTANTIVE ISSUES**

## **ALTERNATIVES**

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

## **AMENDMENTS**